A

ZAQ CONSTRUCTION SDN BHD & ANOR

v.

PUTRAJAYA HOLDINGS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[SUIT NO: 22C-24-07-2013]
2 NOVEMBER 2013

C ***ARBITRATION:*** *Arbitration agreement - Arbitration clause - Operation of - Whether arbitration clause takes effect regardless of whether parties refer matter to arbitration - Whether arbitration clause takes effect where statutory exceptions are present - Arbitration Act 2005, s. 10*

D ***ARBITRATION:*** *Arbitration agreement - Construction of - Arbitration agreements to be construed broadly - Claim premised on failure to pay according to final accounts and claim of set-off - Whether fell within ambit of arbitration agreement*

E ***ARBITRATION:*** *Stay of proceedings - Test to be applied - Whether granting of stay mandatory where requirements satisfied - Whether defendant needs to show defence on merits - Statutory exceptions to grant of stay - Whether defendant had taken a step in proceedings - Whether attending case management amounts to taking a step in proceedings - Arbitration Act 2005, s. 10*

F ***WORDS AND PHRASES:*** *'Shall' - Arbitration Act 2005, s. 10 - Whether mandatory obligation*

G The plaintiffs were partners of a joint venture known as "Zaq-NamFatt JV". There were several contracts that formed the substratum of the relationship between the parties here. Under the first contract ('first contract'), the defendant subcontracted a construction project to the plaintiffs. The plaintiffs completed the project and a Certificate of Practical Completion was issued. The final accounts ('final accounts') were also signed off between the parties. According to the statement of final accounts, the balance due to the plaintiffs was RM4,569,260.48. Under the second contract ('second contract'), the defendant awarded further construction works to another joint-venture between the second plaintiff with another company known as Tripart Sdn Bhd - the "Tripart-NamFatt JV". In the second contract, the statement of final accounts showed that the defendant was owed RM24,322,149.76.

H

I

This statement of final accounts was disputed by Tripart-NamFatt JV with the JV claiming that it was the defendant who owed the JV substantial amounts of money and not the other way around. The dispute over this account and this contract was referred to arbitration. Regardless of that position, the defendant claimed the right to set-off the sum due under the second contract from any monies which were due to the plaintiffs under the first contract. The defendant wanted to resolve this right to set-off at the arbitration. Hence, the defendant applied for a stay of proceedings under s. 10 of the Arbitration Act 2005 ('s. 10'). The plaintiffs contended that stay must be refused because the arbitration agreement here was inoperative or incapable of being performed. The plaintiff submitted that since the final accounts had already been signed off by the parties, there was no dispute to be referred to arbitration under the first contract.

Held (allowing defendant's application with costs):

(1) The language in s. 10(1) is couched in mandatory terms with the use of the word "shall". Where the terms of s. 10(1) are met, the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within s. 10(1) itself and that is where the court finds the "agreement to be null and void, inoperative or incapable of being performed". (para 26)

(2) As for the test to be applied when dealing with an application for stay pending arbitration, s. 10(1) requires the court to first and foremost examine whether the "proceedings" in court are "brought in respect of a matter which is the subject of an arbitration agreement". If the proceedings are indeed brought in respect of a matter which the parties have agreed should be resolved by arbitration, then the court is obliged to stay the proceedings and "refer the parties to arbitration". (paras 35 & 36)

(3) Arbitration agreements are construed broadly so as to give effect to the contractual choice of the parties as opposed to defeating the agreement; unless of course, that choice offends the law. A claim premised on a failure to pay according to the final account was a matter which fell well within the terms of the arbitration agreement. (paras 47 & 49)

(4) For the purpose of s. 10, the defendant was not required to show that it had a defence of merit or even an arguable claim before the arbitral tribunal. The quality of the defence was not a relevant consideration in the present proceedings. The court is not required to evaluate let alone determine the merits of the plaintiffs' claim or the defendant's defence when deciding whether to grant a stay. (para 61)

(5) The plaintiffs' claim and the defendant's claim of a set-off or deduction were matters that fell within the ambit of the arbitration agreement, in that it was related to "the construction of this contract"; or "any matter or thing of whatever nature arising under this contract". That was sufficient for the present application for stay. (para 62)

(6) The statutory grounds for refusing stay did not encompass the situation claimed by the plaintiffs. The signing off in the statement of final accounts could not render the arbitration agreement unenforceable. (para 73)

(7) The operation of arbitration clauses cannot depend on whether parties actually refer the matter to arbitration; unless, the parties mutually agree that it does not, or where the statutory exceptions in s. 10 are present. (para 94)

(8) There was no evidence of the defendant having taken a step in these proceedings such as to disentitle them to the order of stay. The matters which occurred before the learned Deputy Registrar during case management cannot be considered as within the meaning of "steps" in s. 10. Those steps must be definitive, conscious and deliberate steps taken in respect of participating in the court proceedings. Attending case managements before the Deputy Registrar cannot be regarded as within that meaning. (para 100)

Case(s) referred to:

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1992] 1 QB 656 ***(refd)***

Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others [1993] AC 334 ***(refd)***

China Merchants Heavy Industry Co Ltd v. JGC Corp [2001] 3 HKC 580

Dai Yun Shan, The [1992] 2 SLR 508 ***(refd)***

Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd [2005] 4 SLR 646 ***(refd)***

Ellerine Brothers (Pty) Ltd v. Klinger [1982] 1 WLR 1375 ***(refd)***
Getwick Engineers Limited v. Pilecon Engineering Limited [2002] 1020 HKCU 1 ***(refd)***
Halki Shipping Corporation v. Sopex Oils Ltd [1997] 1 WLR 1268 ***(refd)***
Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***
KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 1 CLJ 993 HC ***(refd)***
Kaverit Steel and Crane Ltd v. Kone Corp (Alta CA) [1992] AJ No 40 ***(refd)***
Monmouthshire County Council v. Costello & Kemple Ltd [1965] 5 BLR 83
Monro v. Bognor Urban District Council [1915] 3 KB 167 ***(refd)***
Prince George (City) v. McElhanney Engineering Services Ltd [1995] BCJ No 1474 ***(refd)***
Tjong Very Sumito and others v. Antig Investments Pte Ltd [2009] 4 SLR 732 ***(refd)***
TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA ***(refd)***
Turnock v. Sartoris (1889) 43 Ch D 150 ***(refd)***
Westco Airconditioning Limited v. Sui Chong Construction & Engineering Co Limited [1998] 1 HKC 254 ***(refd)***
Young v. Buckett (1882) 51 LJ Ch 504 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 10(1), (2A), (2B), (2C), (4), 50
Rules of Court 2012, O. 14

Commercial Arbitration Act 1986 [USA], s. 15
International Arbitration Act 2002 [Sing], s. 6

Other source(s) referred to:
MJ Mustill & SC Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn, London, Butterworths, 1989, pp 464-465
Gary B Born, *International Commercial Arbitration (Kluwer Law International, 2009)*, p 1093
JB Casey, *International and Domestic Commercial Arbitration (Carswell, 1993)*, pp 4-14
Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated (Informa, 2009)*, pp 21-22
Russell on Arbitration, Sweet & Maxwell, 22nd edn, 2003, para 7-019
Sundra Rajoo, *The Malaysian Arbitration Act 2005 (Amended 2011), An Annotation*, Lexis Nexis, 2013, pp 56-60

For the plaintiffs - GH Tee; M/s GH Tee & Co
For the defendant - T Kuhendran (Aniz Amirudin with him); M/s Zul Rafique & Partners

Reported by Amutha Suppayah

JUDGMENT

Mary Lim J:

[1] There are two applications before the court: encl. 4 is the defendant's application for a stay of these proceedings under s. 10 of the Arbitration Act 2005 ('Act 646'); and encl. 10 is the plaintiffs' application for summary judgment under O. 14 of the Rules of Court 2012.

[2] As described in the statement of claim, the two plaintiffs here are partners of a joint venture known as "Zaq-NamFatt JV". The first plaintiff gave a power of attorney to the second plaintiff. The second plaintiff is a company in liquidation, the liquidators being Michael Joseph Monteiro and Heng Ji Keng. It is not immediately clear when the second plaintiff went into liquidation. It is however clear that the present action of both plaintiffs is maintained by the liquidators. This is gathered from the statement of claim (para. 1) and also from affidavits affirmed by one Dato' Ng Keng Keong, the previous Group Deputy President/Executive of the second plaintiff ('Dato' Ng') on behalf of both the plaintiffs (see for example para. 2: "I have been duly authorised by the liquidators acting on behalf of the plaintiffs to affirm this affidavit on behalf of the plaintiffs").

[3] The defendant's application for stay is on grounds found in the affidavit affirmed by Hisham Albakri bin Abu Bakar ('Hisham') on 5 July 2013 (encl. 5) to which the plaintiffs have responded *vide* affidavit-in-reply affirmed by Dato' Ng on 19 July 2013 (encl. 8). The defendant has replied to this affidavit *vide* affidavit-in-reply of Hisham affirmed on 2 August 2013 (encl. 12) while Dato' Ng affirmed his second affidavit-in-reply on 22 August 2013 (encl. 14).

[4] The plaintiffs have filed a notice of intention to use all the affidavits filed in relation to its application for summary judgment. This will include the defendant's affidavits. In particular, the plaintiffs seek to rely on Dato' Ng's affidavit filed in support of that application to enter summary judgment which was affirmed on 18 July 2013 (encl. 7).

[5] However, it must be pointed out at the outset that the contract documents and the statement of final account referred to by Dato' Ng in his affidavit affirmed on 18 July 2013, namely exhs. "PA-1" and "PA-2" are not those referred to in the statement of

claim. These exhibits relate to a letter of award dated 29 May 2002 and a contract (Contract No: 1Be/FIT/PRE/CBFO/CON/10N/1013/DA/1000) dated 22 November 2002 for "The proposed supply, delivery and installation of fitting-out works for the general office area and common facilities for government administrative offices of Parcel E (Sub-package 4: E2, E3 & auditorium) at Putrajaya" for the original contract sum of RM71,633,950.67; and the statement of final account for RM1,979,406.62 approved by the defendant's CEO on 19 September 2011.

[6] The correct exhibits are those found in Hisham's affidavit filed in support of the stay application, that is, the contract (Contract No: 1Ba/GVP/PRE/CSPA4/CON/10N/0554) dated 5 September 2001 in relation to "Cadangan pembangunan pejabat kerajaan (Sub-pakej 4) yang mengandungi bangunan kerajaan blok-blok E2, E3, auditorium & kapsule dan kerja-kerja luar di atas sebahagian Lot PT 111, Precint 1 Parcel E untuk Pusat Pentadbiran Kerajaan Persekutuan Di Putrajaya" for the original contract sum of RM123,993,000; and the statement of final account for the sum of RM4,569,260.48 approved by the chief executive officer of the defendant on 26 July 2011 - exhs. "HAB-1" and "HAB-2" respectively. The parties had proceeded regardless as they were quite clear as to which of these contracts are under examination.

[7] The court will first hear the defendant's application for stay. In the event that the application is not granted, the plaintiff's application for summary judgment then becomes relevant for consideration.

Defendant's Arguments For Stay

[8] There are actually several contracts that form the substratum of the relationship between the parties here. Aside from the one exhibited by the plaintiffs and which is not relevant for the present purpose, two other contracts are. It is vital to understand those contracts for a proper appreciation of the arguments taken in relation to the application for a stay under s. 10.

[9] For the present purpose, under what I shall refer to as the "First Contract", the defendant who was awarded the construction of what is known as the "Sub-package 4 office project", a project comprising government offices, auditorium and a "capsule" in Precinct 1 of Parcel E of Pusat Pentadbiran Kerajaan Persekutuan in Putrajaya subcontracted this project to the plaintiffs who, as

"Contractor", completed it on 1 May 2005. A certificate of practical completion for that date was issued. On that same date, the final accounts were signed off between the parties. The defects & liability period of 24 months expired on 1 May 2007 and on 29 June 2010; a certificate of making good defects was issued stating that the defects etc. were made good on 28 December 2009.

[10] According to the statement of final accounts (as exhibited by Hisham), the balance due to the plaintiffs as approved by the defendant's chief executive officer was the sum of RM4,569,260.48. The liquidator on behalf of the "Contractor" had signed the contractor's acknowledgement and agreement to the valuation of that sum. He had also affixed the corporate stamp of both the joint-venture partners. However, the liquidator has not dated the statement. He appears to have done likewise to the other statement of final account for the sum of RM1,979,406.62; which the plaintiffs themselves have erroneously exhibited. The present claim is for the non-payment of the sum stated in the statement of final account, that is, RM4,569,260.48. In encl. 10, the plaintiffs are seeking summary judgment for that sum.

[11] Under what I shall describe as the "Second Contract", the defendant awarded the works in relation to the construction of 622 units of government apartments in Parcel 5R6 in Precinct 5 of Putrajaya to another joint-venture between the second plaintiff with another company known as Tripart Sdn Bhd - the "Tripart-NamFatt JV". This contract dated 25 May 2006 (No: RES/P05/APT/CGEN CON/10N/1469] was for the sum of RM88,139,328.12. In this second contract, the statement of final account approved by the defendant's CEO shows that the defendant is owed RM24,322,149.76. Unlike the earlier statements, the liquidator has not signed this statement. These documents can be found in exh. "HAB-3".

[12] This statement of final account is disputed by Tripart-NamFatt JV with the JV claiming that it is the defendant who owes the JV "substantial amounts of money"; and not the other way around. The liquidators have also rejected the defendant's proof of debt. The defendant has denied the liquidators' claim. The dispute over this account and this contract has since been referred to arbitration.

[13] Regardless of that position, the defendant claims the right or entitlement in law and in equity to deduct this sum due under the second contract from any monies which may become due and payable to the plaintiffs under the first contract. The defendant relies on cl. 47 of the first contract for this deduction or what is actually a set-off, against in particular the second plaintiff. It is this right to set-off that the defendant wants resolved at the arbitration together with the plaintiff's claim under the first contract.

[14] In seeking to stay the plaintiffs' claim and refer the same to arbitration, the defendant argued that with the recent amendments to s. 10 of the Arbitration Act 2005, the test is now simpler. All that the court needs to determine is whether the matter before the court is the subject of the arbitration agreement. The determination of that question involves a construction of the relevant arbitration agreement.

[15] In this case, a construction of the arbitration agreement is said to show that the plaintiffs' claim falls well within the scope and terms of the arbitration agreement found in cl. 63 of the first contract. The defendant submitted that not only is its set-off valid, but so is the arbitration agreement here valid, operative and capable of being performed. The defendant has further expressed quite categorically that it "was, and remains, ready, willing and able to do all things necessary to enable all the matters in dispute to be determined by arbitration in accordance with the aforesaid cl. 63".

Plaintiffs' Arguments Against Stay

[16] In response, learned counsel for the plaintiffs argued that s. 10 of the Act 646 provides that the stay pending arbitration is to be refused where the court "finds that the agreement is null and void, inoperative or incapable of being performed". In this case, the plaintiff is contending stay must be refused because the arbitration agreement here is inoperative or incapable of being performed.

[17] Learned counsel for the plaintiffs argued that s. 10 does not limit the circumstances and/or situations which render the arbitration agreement inoperative or incapable of being performed. It is a question of fact in each case.

[18] The plaintiffs say that the facts of this case point to the inoperativeness and incapability of performance of the arbitration agreement. The plaintiffs cited the cases of *Heyman v. Darwins Ltd* [1942] AC 356, *Monro v. Bognor Urban District Council* [1915] 3 KB 167, *Turnock v. Sartoris* (1889) 43 Ch D 150, *Young v. Buckett* (1882) 51 LJ Ch 504 and *Monmouthshire County Council v. Costello & Kemple Ltd* [1965] 5 BLR 83 in support.

[19] In *Heyman v. Darwins Ltd*, at p. 370, Lord Macmillan in the House of Lords had said that when considering whether or not to grant stay, "the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

[20] It is the plaintiffs' argument that of those four questions, the first three questions must be answered first before deciding whether or not to grant the order of stay sought. The plaintiff was prepared to say that the fourth question is inapplicable in view of the recent amendment to s. 10.

[21] In relation to the first question, learned counsel for the plaintiff submitted that the plaintiff's claim is for the agreed balance amount in the final account under the first contract. Since this final account has already been signed off, agreed and accepted by the parties, there is no dispute. Therefore, there is no dispute to refer to arbitration. In short, arbitration does not arise under the first contract.

[22] The plaintiffs say that the precise nature of the defendant's dispute is its claim under the second contract which it is now attempting to use to set-off the plaintiffs' claim under the first contract. The defendant is said to be relying on a "draft" statement of final account which was not signed by Tripart-NamFatt JV who in any case is said to be disputing the defendant's claim in the second contract. The plaintiffs say that

when "analysed in the correct perspective, the precise nature of the dispute is who is whether it is the defendant or Tripart-NamFatt who is entitled to recover losses and damages from the other party" under the second contract. Once properly understood, it was submitted that the disputes between the defendant and Tripart-NamFatt JV falls within the arbitration clause of the second contract, and not the arbitration clause of the first contract. Any arbitrator appointed under the arbitration clause in the first contract would have no jurisdiction to determine any disputes under the second contract.

[23] Given that the real disputes are between the defendant and Tripart-Nam Fatt JV which is a contract entirely separate from the first contract; and given that there has been no reference of any dispute to the E.R. for decision, the plaintiffs argued that the arbitration clause is therefore inoperative or incapable of being enforced. The plaintiffs added that in any case, the E.R. who is the defendant's CEO. has nothing to decide since he has already signed off and agreed to the statement of final account. Accordingly, it was submitted that the court has no power to grant the stay sought.

Determination Of The Court

[24] With respect, the court must disagree with the plaintiffs.

[25] Starting first with sub-s. 10(1) of Act 646 which was amended in 2011. It must be pointed out that s. 10 saw several amendments including amendments to sub-ss. 10(1), (2A), (2B), (2C) and (4). In relation to sub-s. 10(1), it now reads as follow:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed.

[26] It will be appreciated that the language in sub-s. 10(1) is couched in mandatory terms with the use of the word "shall". Where the terms of sub-s. 10(1) are met, the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within sub-s. 10(1) itself and that is where the court finds the "agreement to be null and void, inoperative or incapable of being performed".

[27] The recent amendment in this regard deleted the previous statutory exception that was contained in para. 10(1)(b) and that is where the court finds "that there is in fact no dispute between the parties with regard to the matters to be referred". With the removal of this exception, the remaining exceptions which were then found in para. 10(1)(a) were redrafted into the new sub-s. 10(1).

[28] Save for this amendment to sub-s. 10(1), the intention in sub-s. 10(1) has always been the same. In my view, from the time of its first enactment in 2005, the provisions on stay have always been in mandatory terms. What this amendment has done is to remove what may be said to be a somewhat cumbersome and sometimes difficult to grapple with exception found in para. (b). There was frequently concern that in determining whether or not there was in fact a dispute between the parties, the court was embarking on an unnecessary journey and intervening on what was understood as autonomous party choices.

[29] These amendments brought greater clarity of the mandatory approach in matters concerning stay pending arbitration. This approach is consistent with the recognition that in regulating their contractual relationships, parties may choose arbitration as the particular method for the resolution of their disputes or differences. That choice is reflected in the arbitration agreement found generally in the underlying contract between the parties.

[30] With these recent amendments to sub-s. 10(1), as opined in *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993, the test is now a "simpler test of whether the matter before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, it will become a matter of construction of the relevant arbitration agreement, where it exists".

[31] The Court of Appeal recently had occasion to deal with the effect of the amendments to s. 10 in the case of *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288. In a unanimous decision, the Court of Appeal pronounced that:

> The present form of section 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1st July 2011 (Act A 1395). It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The Court is no longer required to delve into the facts of the dispute

when considering an application for stay. Indeed, following the decision of the Court in *CMS Energy Sdn Bhd v. Poscon Corporation* (*supra*), a Court of law should lean towards compelling the parties to honour the 'arbitration agreement;' even if the Court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal. In this respect, we pause to observe that even the Singapore Court of Appeal in a very recent decision opined as follows on the question of stay:

... Woo J was quick to add this important caveat that if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. We agree with measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of S6 of the IAA itself. However, it is only in the clearest of cases that the Court ought to make a ruling on the inapplicability of an arbitration agreement.

(see the case of *Tjiong Very Sumito and others v. Antig Investments Pte Ltd* [2009] SGCA 41)

[32] Since the enactment of the Arbitration Act of 2005 (Act 646), the courts have been more consistent in favouring arbitration, recognising arbitration as the parties' choice of dispute resolution and that parties must abide by their binding contractual obligations. This recent pronouncement from the Court of Appeal reiterates that stand.

[33] In my judgment, this effect of sub-s. 10(1) differs materially from the approach in *Heyman v. Darwins Ltd*. Unlike the provisions of s. 10 where stay of court proceedings is mandatory unless a plaintiff's claim is statutorily excepted or because the subject matter of the claim is outside the terms of the arbitration agreement, the court in *Heyman v. Darwins Ltd* treated stay applications as a matter of exercise of discretion. The questions posed by Lord Macmillan guide in the exercise of that discretion. Although the court may ask similar questions or consider similar factors, the mandatory effect of sub-s. 10(1) cannot be over-emphasised.

[34] This broad approach towards arbitration agreements is also followed in England. According to *Russell on Arbitration* (Sweet & Maxwell, 22nd edn., 2003) para. 7-019:

> Before the Arbitration Act 1996 was enacted a stay of court proceedings, even in the case of a non-domestic arbitration agreement would not be granted if the court was satisfied that there was in fact no dispute between the parties with regard to the matter agreed to be referred. This situation arose out of a controversial provision in the previous Arbitration Act, which has been repealed. As a result of the repeal the court no longer has a discretion in the matter, and the previous case law on the subject of whether or not there is a dispute can be disregarded. Once the court is satisfied that there is a dispute, it is obliged to under section 9 of the Arbitration Act 1996 to grant the respondent a stay of the legal proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed. For the purpose of section 9, the word "dispute" is to be given its ordinary meaning and includes any claim which the other party refused to admit or did not pay, whether or not there is any answer to the claim in fact or in law.

[35] As for the test to be applied when dealing with an application for stay pending arbitration under sub-s. 10(1) of Act 646, it is my view that the test is apparent from the opening words in sub-s. 10(1).

[36] Sub-section 10(1) requires the court to first and foremost examine whether the "proceedings" in court today are "brought in respect of a matter which is the subject of an arbitration agreement". If the proceedings are indeed brought in respect of a matter which the parties have agreed should be resolved by arbitration, then the court is obliged to stay these proceedings and "refer the parties to arbitration".

[37] It is also observed that the term "proceedings" is used in sub-s. 10(1) as opposed to "claim, action or suit". This term may be said to include any claim, action or suit as well as any originating summons filed whether under the Rules of Court 2012 or under s. 50 of Act 646.

[38] As to whether the proceedings in court are in respect of a matter which is the subject of an arbitration agreement; that depends on what is the ambit of the arbitration agreement. But, even before that, it must first be recognised that it is the plaintiffs' claim before the court and not what the defendant's response or

defence is to that claim which bears the brunt of scrutiny. The precise nature of the plaintiffs' claim in court is for the balance amount due under the first contract. In support of its claim, it relies on the statement of final account under the first contract. That statement of final account has been signed off by both parties. Despite that, the defendant has not paid. It is because of that failure to pay that the plaintiffs are before the court.

[39] Next, the court must determine whether the plaintiffs' claim for the balance due under the first contract falls within the terms of the arbitration agreement. For that, one needs to examine and construe the terms of the arbitration agreement.

[40] It is not in dispute that the arbitration agreement is to be found in cl. 63 of the first contract which provides:

> 63.1 (a) **If any dispute or difference** shall arise between the employer and the contractor, either during the performance or after completion of the design or the works, or after the termination of the contractor's employment, or breach of this contract, **as to**:
>
> (i) **the construction of this contract**; or
>
> (ii) **any matter or thing of whatever nature arising under this contract**; or
>
> (iii) the withholding by the E.R. of any certificate to which the contractor may claim to be entitled,
>
> **then such dispute or difference shall be referred to the E.R. for a decision.**
>
> (c) If the E.R. fails to give a decision for a period of 45 days, after being requested to do so by the contractor or if the contractor being dissatisfied with any decision of the E.R., then in any such case the contractor may within 45 days after the expiration of 45 days after he had made his request to the E.R. or 45 days after receiving the decision of the E.R., as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between the parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur using the facilities and assistance available at the centre. (emphasis added)

[41] The parties have agreed under cl. 63 to refer "any dispute or difference" which arises between the parties to arbitration. Such dispute or difference may arise either during the performance or after completion of the design or the works, or after the termination of the contractor's employment, or breach of this contract. The dispute may be on (i) the construction of this contract; (ii) any matter or thing of whatever nature arising under this contract; or (iii) the withholding by the E.R. of any certificate to which the contractor may claim to be entitled.

[42] The decision of the Court of Appeal in Singapore in *Tjong Very Sumito and others v. Antig Investments Pte Ltd* [2009] 4 SLR 732, is instructive on the approach to be adopted when construing the terms of the arbitration agreement. In that decision, the court had to deal with the question of stay under s. 6 of the International Arbitration Act of Singapore (Cap 143A, 2002 Rev Ed). That provision is substantially similar in effect to our s. 10. The arbitration agreement here provided for:

> ...any and all disputes, controversies, and conflicts arising out of or in connection with this Agreement or its performance (including the validity of this Agreement) shall be settled by arbitration by a three (3) member arbitration board which will hold its sessions...

[43] At p. 744 of the decision, the Court of Appeal recognised that while the word "dispute" does not appear in s. 6; the term nevertheless is prevalent in arbitration agreements. In fact, VK Rajah JA who delivered the decision of the court prefaced the decision with these pointed remarks about the term "dispute":

> 1 "Dispute" is a preterm that derives its meaning from its context. The word is deceptively simple to understand in everyday usage but elusively difficult to explain as a legal term. It has (together with its other less frequently used legal cousins such as "differences" and "controversies") particular significance in the field of arbitration as most arbitration clauses stipulate that before a reference to arbitration can be made, a dispute must exist. As a consequence, it is commonplace for legal challenges to be made on: (a) whether a "dispute" exists; and (b) whether a court or an arbitral tribunal has jurisdiction to hear a particular matter. Not surprisingly, such challenges are also usually accompanied by heated debates about whether the alleged dispute is *bona fide*.
>
> 2 Unfortunately, the common law courts, particularly those in England have generated not entirely consistent strands of thought on the meaning of the word; apparently for historical reasons...

> While the current position appears to be more settled, it continues to be a matter of importance to the arbitral community that there should be clarity as to what constitutes a "dispute". However, attempts to define what constitutes a "dispute" with hard-edged precision will necessarily be unsuccessful, given the infinite circumstances in which disputes may arise or cease to exist. That said, the Sisyphean nature of the task should not deter measured judicial attempts to further illuminate how this word (and like words) may be ordinarily interpreted with the proviso that all cases must fall to be decided on their own special facts and the frank acknowledgment that further glosses will arise ...

[44] The Court of Appeal then set about exploring the existing case law on the topic and the genesis of the present approach to the interpretation of the term "dispute". It analysed the judicial philosophy towards arbitration going back to the early days when arbitration was "viewed disdainfully as an inferior process of justice" to the current status that "Those days are now well behind us." The Court of Appeal took cognisance of the fact that Singapore adhered to different regimes for domestic and international arbitrations with the courts possessing a "somewhat wider role and broader judicial latitude in domestic arbitration; though even this is to be exercised in a guarded manner"; before finally advocating the sensible adoption of a broader or wider approach when construing the scope of arbitration agreements.

[45] At p. 747, the Court of Appeal cited several authors on this; the learned author of Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p. 1093 stated that "most national courts have (in recent years) sensibly adopted broad interpretations of the terms 'dispute', 'difference' and controversy" (emphasis added).

[46] Then, there were the authors Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at pp. 21-22, who summarised the current position in Singapore as follows:

> The general definition of dispute requires the making of a claim by one party and its rejection by the other. Whether this has occurred in the course of lengthy correspondence and negotiation between the parties is not always immediately obvious. The making of a formal claim with a time limit for response is perhaps the simplest method of requiring the other party to define his position, but even if this approach is not used a failure by the other party to respond to a claim does not necessarily deny the

existence of a dispute particularly where there are clear unresolved disagreements following the conclusion of negotiations. A dispute may also be found to arise even though negotiations are still in progress, at least where it is clear that these are being protracted in an attempt to forestall proceedings. By contrast there is no dispute if a response to the claim is under consideration, if the issues are purely hypothetical or arise between the parties and a third party who is not subject to the arbitration clause. … In *Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd* it was said that where a defendant refuses to pay or to admit a debt or remains silent because he has no money to pay or simply because he is intransigent, there would be no dispute, although it would be different if the defendant made a positive assertion that he was disputing the claim, in which case there would be a dispute even though it could be easily demonstrated that he was wrong. The quality of the defence is not, therefore, an issue which can be assessed by a court where there is an arbitration clause and accordingly the court cannot give summary judgment even though the outcome of the case is all but inevitable but must stay its proceedings where the matter is arguable so that the arbitrators can resolve the issue between the parties.

[47] In short, arbitration agreements are construed broadly so as to give effect to the contractual choice of the parties as opposed to defeating the agreement; unless of course, that choice offended the law. The Court of Appeal further opined that it would readily find that a dispute existed; the exception, however, would be where the defendant had unequivocally admitted that the claim was due and payable. This point will be dealt with in greater detail shortly except to say that this approach was said to be in line with the philosophy of minimalist court intervention in matters that parties had agreed to submit to arbitration. At p. 746, the court stated: "Concurrent arbitration and court proceedings were to be avoided unless it is for the purpose of lending curial assistance to the arbitral process".

[48] As can be seen, ultimately, the court will have to construe and determine the meaning of the term "dispute" or "difference". What constitutes a "dispute" or "difference" will be a matter of construction of the terms of the arbitration agreement having regard to the whole factual matrix. I must add that this is not for the purpose of determining whether a dispute in fact existed, which was the position before under the old para. 10(1)(6). This exercise is purely to construe the subject matter of the arbitration agreement.

[49] Applying those principles here, and after having examined the arbitration agreement which is housed in this cl. 63, it cannot be denied that a claim which is premised on a failure to pay according to the final account is a matter which falls well within the terms of the arbitration agreement. The plaintiffs' claim is without doubt one which arises after the completion of the works. It concerns a "construction of this contract; or any matter or thing of whatever nature arising under this contract;" which are quite clearly "matters" which are the subject of the arbitration agreement.

[50] In making its submissions against the granting of stay, the plaintiff is in fact, testing the merits or strength of its case in court. But, that with respect, avoids the real question which is, whether the "proceedings" in court are "brought in respect of a matter which is the subject of an arbitration agreement". If the answer is in the affirmative, then the court must stay the proceedings in court. The whole rationale in this approach is once again, the policy of minimum court interference on the contractual choices of the plaintiffs and the defendant; that their disputes or differences are to be resolved by arbitration; and not by the court. In directing a stay pending arbitration, the court is really at the end of the day enforcing the contractual obligations of the parties.

[51] The issue of a set-off was discussed in *Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 where the court refused to grant stay. There, the first two plaintiffs, namely, Dalian Hualaing Enterprise Co Ltd ('DHE') and Dalian Jinshi Oil-Making Co Ltd ('DJOM') entered into a contract dated 1 November 2003 wherein DHE agreed to buy from the defendant 55,000 mt of soya beans with 10% more or less at the defendant's option and at a premium. The shipment was ex-US Gulf, Brazil or Argentina. The vessel, Armonikos, was designated to carry the cargo. For this reason, the court there referred to this as the "Armonikos contract". By another contract dated 8 March 2004, the Armonikos contract was assigned by DHE to DJOM. The defendant was a party to this contract of assignment.

[52] DJOM claimed payment of despatch money and overage premium under the Armonikos contract. By email sent by one Sally Yang of the defendant Beijing to the agent for DHE and then for DJOM, Miss Yang confirmed of a certain sum as payable. DHE and DJOM's action in court was for the despatch money and overage premium. The defendant applied for a stay of the action

on the ground that pursuant to an arbitration agreement in the Armonikos contract, the dispute between the parties should be referred to arbitration in London under the auspices of FOSFA, the Federation of Oils, Seeds and Fats Association Limited.

[53] Before the court, the issues that arose were whether there was an admission by the defendant of the debt; and assuming there was such an admission, whether the defendant was entitled to claim a set-off from a running account.

[54] The defendant argued that there was no admission claiming that Miss Yang was not its employee but an employee of Louis Dreyfus China in which case, she had no authority to bind the defendant on liability and quantum. As for the set-off, the defendant claimed against a company by the name of Guangdong Fuhong Edible Oil Co Ltd under an entirely different contract carried by a vessel called the Hanjian Tacoma. The court referred to this contract as the "Hanjian Tacoma contract".

[55] As it turned out, the court found the issue of the authority of Miss Yang to be a "red herring" as there was another piece of evidence, that is, a statement of account issued by the defendant itself which "demonstrated that Louis Dreyfus was accepting that the sums claimed under the Armonikos contract would be due and payable but for its claim under the Hanjin Tacoma contract."

[56] On whether the issue of set-off was within the scope of the arbitration agreement, Woo J was not prepared to say that it was. At p. 654, he said:

> I was of the view that the phrase "any dispute" should also be given a wide interpretation. Nevertheless, it would not cover a dispute unrelated to the transaction covered by the Armonikos contract. For example, if there was a dispute between DHE and DJOM on the one hand and Louis Dreyfus on the other hand under a separate contract which did not have an arbitration agreement, would that dispute be caught by the arbitration agreement in the Armonikos contract? Surely not. Likewise, even if that separate contract had its own arbitration agreement, the dispute thereunder would be referred to arbitration under that arbitration agreement and not under the arbitration agreement in the Armonikos contract.

[57] His Lordship then went on to find that:

> On the facts before me, I had found that there was an admission that the sums claimed under the Armonikos contract would be due and payable but for the claim under the Hanjian Tacoma contract. The disputes under the Hanjian Tacoma contract were separate and distinct from the Armonikos contract. Furthermore, neither DHE or DJOM was a party to the Hanjian Tacoma contract. While it is true that the sums claimed by the plaintiffs were payable under the Armonikos contract, the allegation about the running account arose only because of Louis Dreyfus' claim under the Hanjian Tacoma contract. Furthermore, the issue as to whether there was a running account or not was, in my view, unrelated to the very transaction under the Armonikos contract. Indeed, the submission for Louis Dreyfus was simply that the "defence of a running account undoubtedly falls within the scope of the arbitration agreement". This was a bald argument. In my view, it was clear that the set-off issue was not the subject of the arbitration agreement.

[58] The facts and circumstances in *Dalian Hualiang Enterprise* are quite different from those presented here. In our case, the defendant's argument of an entitlement to deduction is pivoted around cl. 47 of the standard form of conditions of main contract which reads:

> DEDUCTION FROM MONEY DUE TO CONTRACTOR
>
> *The Employer or the E.R. on its behalf shall be entitled to deduct any money owing from the Contractor to the Employer under this Contract from any sum (including any amount stated as due in an interim Certificate issued by the E.R. under Clause 46) which may become due or is payable to the Contractor under this Contract or any other contracts to which the Employer and the Contractor are parties*. The E.R. in issuing any certificate under Clause 46 (PAYMENT TO CONTRACTOR AND INTERIM CERTIFICATES) shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Employer may be entitled for the recovery of such sums. (emphasis added)

[59] Clause 47 provides for deduction of monies from the plaintiffs who are the "Contractor" under the first contract. There is before the court at least two statements of final account; one under the first contract, the other under the second contract. In the statement of final account for the first account, the plaintiffs

A are said to be owed money by the defendant. In the statement of final account for the second contract, the defendant is owed money the JV of which the second plaintiff is a partner.

[60] There are obviously common parties in those two contracts. B The defendant and the second plaintiff are common contracting parties in both the first contract and the second contract. Both joint-ventures entered into by the second plaintiff with Tripart Sdn Bhd and with Zaq Construction Sdn Bhd were most probably arrangements made for business efficacy to maximise opportunities C and benefits. Still, the relevant contracts show that the JV partners contracted at all times using their own individual corporate name.

[61] The defendant's efforts in raising an issue of deduction or D set-off are entirely for the defendant to do so at the arbitration; not in these proceedings. For the purpose of s. 10, the defendant is not required to show that it has a defence of merit or even an arguable claim before the arbitral tribunal. The quality of the defence is not a relevant consideration in the present proceedings. E Whether the defendant's interpretation or reliance on the operation of cl. 47 is correct is also not the material for the present purpose. The court is not required to evaluate let alone determine the merits of the plaintiffs' claim or the defendant's defence when deciding whether to grant stay. Nevertheless, it F cannot be denied that the defendant's argument of its entitlement to a deduction or set-off from any monies under the first contract merits consideration.

[62] In as much as whether or not the plaintiffs will succeed in their claim, the question of whether the defendant is right in G making this claim or whether it will succeed or otherwise; is simply not for this court to determine. That argument is properly taken before the arbitral tribunal, if the parties chose to. The matters which the plaintiffs have raised in support of its claim are evidentiary matters which are also more properly taken in the H arbitration proceedings. Evidently, the plaintiffs' claim and the defendant's claim of a set-off or deduction are matters that fall within the ambit of the arbitration agreement found in cl. 63(1)(a)(i) and (ii) in that it does relate to "the construction of this contract"; or "any matter or thing of whatever nature arising I under this contract". That is sufficient for the purposes of the present application for stay.

[63] Moving on to the statutory constraints or grounds for refusing a stay under sub-s. 10(1). The plaintiffs argued that the arbitration agreement is inoperative or incapable of being performed because of the position of the statement of final accounts. With this statement and what it represents, there is no dispute or difference to refer to arbitration in which case, the arbitration agreement is said to be inoperative and incapable of being performed.

[64] With respect, I disagree. The statutory constraints in sub-s. 10(1) refer to those elements, where if present, will render the arbitration agreement invalid or unenforceable by reason, say of illegality or frustration. For the arbitration agreement to be inoperative or incapable of being performed, those constraints must relate to the arbitration agreement itself.

[65] These terms also refer to situations or circumstances where it is legally or practically impossible to make a valid reference to arbitration pursuant to the arbitration clause or arbitration agreement. For instance, the arbitration agreement provides for a non-existent venue; or the time limited for its invocation has lapsed. A discussion of the same can be found in "*The Malaysian Arbitration Act 2005 (Amended 2011), An Annotation*" by Sundra Rajoo, 2013 Lexis Nexis, at pp. 56-60.

[66] There is support of this view in *Kaverit Steel and Crane Ltd v. Kone Corp (Alta CA)* [1992] AJ No 40; [1992] 87 DLR (4th) 129, where the Court of Appeal of Alberta opined that:

> ...the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in *Heyman v. Darwins Limited* cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring Court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced"). See *Paszy v. Haendlaer & Naterman* [1981] 1 Lloyd's Law Reports 302 at 307-8.

[67] The above decision was cited with approval in *Prince George (City) v. McElhanney Engineering Services Ltd* [1995] BCJ No. 1474, where the British Columbia Court of Appeal heard an appeal against the decision refusing stay pending on the ground that the arbitration agreement had become "inoperative". Section 15 of the Commercial Arbitration Act 1986 was the relevant provision under consideration and it reads:

> 15(1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any step in the proceedings, apply to that court to stay the legal proceedings.
>
> (2) In an application under sub-s. (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[68] According to the Court of Appeal, there are three prerequisites to the application of s. 15; namely:

> (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
>
> (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
>
> (c) the application must be brought timely; i.e. before the applicant takes a step in the proceeding (*Gulf Air Canada Resources Ltd v. Anochem International Ltd*).

[69] Although it had been contended that there was no evidence of a dispute and therefore nothing to arbitrate; that the claims procedure had not been followed; the Court of Appeal found that each of these requisites was met. It opined that "it is clear beyond peradventure that there exists a dispute between the parties which involves matters agreed to be submitted to arbitration."

[70] The British Columbia Court of Appeal further cited MJ Mustill & SC Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn. (London, Butterworths, 1989) at pp. 464-465 where the learned authors said:

> The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not *void ab initio*, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative". First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second, as is discussed in Chapter 32, there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties. *But the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement "inoperative".* (emphasis added)

[71] In relation to the meaning of the phrase "incapable of being performed", the Court of Appeal referred to *JB Casey, International and Domestic Commercial Arbitration* (Carswell, 1993) at pp. 4-14 which stated:

> According to Mustill & Boyd, "incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. For example, it is not sufficient to say it is incapable of being performed where one party could not or would not come up with the deposit necessary to pay the arbitrator. The incapacity must come from something beyond the control of the parties; for example, where the arbitration agreement specifies a particular arbitrator must hear the matter, but he or she is not available.

[72] The court went on to say that "the fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause." The Court of Appeal further disagreed with the first instance decision of the existence

of discretion in s. 15. It was the court's view that once the prerequisites were not met, then court should refuse stay. However, "if it was arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration."

[73] It is therefore quite apparent that the statutory grounds for refusing stay do not encompass the situation claimed by the plaintiffs. I cannot see how the signing off in the statement of final accounts can render the arbitration agreement unenforceable in that it is inoperative and incapable of being performed.

[74] In any case, the plaintiffs' acknowledgement is with reservations:

> This is a Final Account Statement and the valuation may be subject to further deduction for such unfulfilled obligations which may arise or have arisen pursuant to the provisions of the Conditions of Contract. I/We, the undersigned, hereby acknowledge receipt of the above and agree to the valuation shown thereof and hereby confirm that save for any unfulfilled obligations referred to above, we have complied to the Conditions of Contract as at the date stated herein below and declare that we have no further claim under this Contract.

[75] The plaintiffs have relied on the decisions of *Monro v. Bognor Urban District Council* [1915] 3 KB 167, *Turnock v. Sartoris* (1889) 43 Ch D 150, *Young v. Buckett* (1882) 51 LJ Ch 504 and *Monmouthshire County Council v. Costello & Kemple Ltd* [1965] 5 BLR 83 in support of its contention that the arbitration agreement here is "inoperative or incapable of being performed". However, it will be seen that save for the case of *Young v. Buckett*, the factual matrix of those cases were quite distinctly different.

[76] In *Monro v. Bognor Urban District Council*, the plaintiff claimed to have been induced to enter into the contract with the defendant based on certain representations which the plaintiff found subsequently to be untrue. It then sought damages for fraudulent misrepresentation and to have the contract declared void. On appeal, the Court of Appeal held the claim for misrepresentation was not a dispute "upon or in relation to or in connection with the contract". The claim fell outside the ambit of the arbitration agreement and therefore stay ought to be refused. In *Turnock v. Sartoris*, the court refused stay where the dispute falls partly outside and partly within the arbitration agreement.

[77] Although I agree with the decision in *Young v. Buckett* where the court refused to grant stay when the time for referring the differences from the two arbitration had expired ("within 40 days next after such dispute, doubt or question shall arise"); it must be noted that the court did not discuss this refusal in the context of whether the arbitration agreement had become "inoperative or incapable of being performed". The court merely looked at the time frame for referring disputes between partners to arbitration. Once it was established that the bulk of the disputes arose more than forty days before the reference to arbitration, the court concluded that there was no agreement to refer to arbitration.

[78] As for the decision in *Monmouthshire County Council*, the prerequisite to a valid reference to arbitration was a decision of the engineer. Since there was none, the court found that any arbitration would be null and void.

[79] Again, this decision must be appreciated in its proper context. The question before the court was not about an application for stay pending arbitration. Instead, the dispute between the parties had proceeded to arbitration and the appellant was in court seeking a declaration as to the validity of the appointment of the arbitrator and the operation of cl. 66 of the ICE Conditions of Contract. The appellant maintained that the arbitrator's appointment was null and void and that he had no jurisdiction to act.

[80] The Court of Appeal agreed. The decision of Harman LJ gives some indication as to why the Court of Appeal took that particular approach. At p. 91, His Lordship said:

> The other consideration which moves me is this. This is a process by which the defendants can be deprived of their general rights at law and therefore one must construe it with some strictness as having a forfeiting effect. It is not a penal clause, but must be construed against any person putting it forward who is, after all, trying to shut out the ordinary citizen's right to go to the courts to have his grievances ventilated. Therefore, I think it would require very clear words and a very clear decision by the appropriate person, namely the engineer, to shut the defendants out of their rights ...

[81] In my view, the proper or more appropriate argument here is whether there is any dispute to refer to arbitration because of the existence of the statement of final account. And, here, the

issue is whether it may be said that there is in fact an admission by reason of the statement of final account. That is, whether an admission effectively means there is no dispute to refer to arbitration.

[82] There are extensive deliberations on the significance and effect of an admission in the Singaporean Court of Appeal's decision in Tjiong Very Sumito, at pp. 759-765. At the end of the day, the court remained cautious on the question of admission, that it has to be clear, unequivocal and it must be both on liability and quantum.

[83] In that decision, the Court of Appeal first acknowledged that even the authors Merkin and Hjalmarsson (*supra*) at p. 22 added that an "admission by a defendant would, generally speaking, be contrary to a finding of a dispute but not every admission would necessarily avoid a stay order". The court cited the "attractively concise and oft-quoted statements" found in the decisions of Goh Joon Seng J in the *Dai Yun Shan, The* [1992] 2 SLR 508 who "pragmatically noted that "so long as the claim is not admitted, a dispute exists"; and Templeman LJ in *Ellerine Brothers (Pty) Ltd v. Klinger* [1982] 1 WLR 1375, at p. 1383 (Ellerine Brothers):

> There is a dispute until the defendant admits that the sum is due and payable ...

[84] It however recognised that with these pronouncements comes "the converse proposition that where there has been an admission, there is no longer any dispute and the arbitration agreement does not apply. This raises the problem envisaged by Saville J in *Hayter* (*[44] supra*) and Clarke J in *Halki* (*[58] infra*): that logically, the arbitral tribunal would not have jurisdiction to hear the claim or make an award, and that a mischievous and recalcitrant defendant might use precisely the argument that its defence was hopeless to thwart the arbitration. As Saville J perceptively pointed out, the conundrum created by the analysis that the arbitration agreement does not apply to the claim at hand because the defendant has made a clear and unequivocal admission giving rise to often-inevitable summary judgment, is that, by the same token, the arbitral tribunal would have no jurisdiction and the claimant would only be able to commence litigation proceedings."

[85] The court next examined the decision of the *Getwick Engineers Limited v. Pilecon Engineering Limited* [2002] 1020 HKCU 1 (Getwick) and expressed the view that the court agreed "with Ma J's robust approach in assessing the effect of dishonoured cheques in such limited circumstances."

[86] In the facts of that case, the plaintiff claimed from the defendant outstanding amounts under six payment certificates for works done under a sub-contract entered into between the parties. The defendant wrote a draft letter stating its intention to make payment of a certified sum by three post-dated cheques. In that same letter, the defendant also said, "The exact amount of further payment shall be agreed after the completion of our final account to this subcontract".

[87] The defendant issued three cheques to the plaintiff, two of which were honoured. The plaintiff sought summary judgment for, *inter alia*, its claim in the amount stated in the dishonoured cheque. Geoffrey Ma J (as His Lordship then was) granted summary judgment for the amount in the dishonoured cheque but ordered a stay of proceedings for the rest of the plaintiff's claims. His Lordship held that interim payment certificates were not clear and unambiguous admissions of liability for work done, but merely referred to interim payments which did not involve final acceptance by the defendant either that the work done by the plaintiff was up to standard or that the amount stated in the payment certificate was ultimately unequivocally and indisputably due.

[88] Nevertheless insofar as the dishonoured cheque was concerned, His Lordship said that it was:

> … *to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates*. This cheque was issued following the 28 April letter … It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff … In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted … *Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded.* (emphasis added)

[89] The Court of Appeal also acknowledged the "analysis of an "admission" is also unsatisfactory if one construes "dispute" to mean "unsatisfied claim", regardless of whether liability is admitted, as Clarke J suggested in *Halki Shipping Corporation v. Sopex Oils Ltd* [1997] 1 WLR 1268 at p. 1272:

> It seems to me to make no commercial sense to hold that the parties intended that the arbitrators should have jurisdiction over those parts of either party's claim in respect of which the other party was has an arguable defence but not otherwise. *It makes more sense to hold that the parties intended that the arbitrators should have jurisdiction over all claims which either party has refused to pay*. Thus it was contemplated that all such claims should be determined by private arbitration before commercial men and not by the courts.
>
> Mr. Hamblen recognised that the logic of his argument is that the arbitrators have no jurisdiction to make an award in respect of an indisputable part of the claim. He also accepted that they have often made such awards in similar circumstances in the past, but he said that the problem does not arise and will not arise in practice because parties do not take the point that the arbitrators have no jurisdiction on the ground that their defence is hopeless. In my judgment, that is or would not be a satisfactory state of affairs. It seems to me to be almost inconceivable that the parties to a contract of this kind intended to confer the kind of limited jurisdiction upon the arbitrators which Mr. Hamblen's submissions would involve, if they were right.
>
> I am not persuaded that parties might not take the point in the future. A *respondent who had no defence to a claim might well sit back and do not nothing while a claimant obtained an award and then resist enforcement proceedings on the basis that the arbitrators had no jurisdiction, by which time the claimant might be out of time to bring court proceedings unless he was alive to the point and issued a protective writ*. (emphasis added)

[90] For its part, the court expressed that it was prepared to recognise an exception to judicial intervention and refuse stay:

> ...only in obvious cases such as *Getwick* (*[37] supra*) (or, more exemplary, in the case envisaged by Woo J where the defendant had admitted liability but was simply unable to pay, in which case a stay application really ought not to be made at all) where there has been a clear and unequivocal admission. This is not to say that the claimant would be unable to prosecute its claim in

arbitration; given the competence of the arbitral tribunal to decide whether it has jurisdiction. The only commonsensical response to the recalcitrant defendant envisaged by Clarke J would be for the arbitral tribunal to rule that it has jurisdiction and to make a summary award. Under the IAA, such an award, even if technically contrary to the logic of Clarke J's reasoning in *Halki* (*[58] supra*), would not be impeachable for an error of law alone, and indeed we cannot imagine a court entertaining any challenge to such an award by a defendant who had admitted liability but refused to pay and then resisted arbitration on the ground that there was no dispute because of its own admission. It is, thus, not an inevitable conclusion that the arbitration agreement would be inapplicable and the deplorable state of affairs envisaged by Clarke J above would come to pass. The proper analysis of a claim brought in spite of an arbitration agreement where there has been clear and unequivocal admission by the defendant, therefore, is as an exception to the scrupulous enforcement of arbitration agreement. This exception will only be made where there has been a clear and unequivocal admission, and it can thus be said that there exists no dispute mandatorily referable to arbitration.

[91] The court was aware of yet another category of cases where admission may be said to arise by reason of silence or prevarication – see paras. 60 to 61. In this respect, the court expressed its preference for Templeman LJ's reasoning and approach in *Ellerine Brothers* (*supra*) to Woo J's general dicta on the effect of silence in *Dalian Hualiang Enterprise* (*supra*). It was the court's view that:

... a defendant's silence (even in the face of repeated claims against it), without more, may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a dispute (or controversy of conflict). We note with interest that pursuant to Art 25(b) of the Model Law, even if the respondent fails to submit its statement of defence, the arbitral tribunal is required to continue the proceedings "without treating such failure in itself as an admission of the claimant's allegations". In our view, non-admission is not constituted only by an express denial or rejection of the claim, but may also be inferred from previous inconclusive discussions between parties, prevarication and even silence. Silence, on its own, is often equivocal at best. We accept, as Woo J pointed out in *Dalian* at [75], that a party may be silent because he has no money to pay or may even want to delay a just resolution of a claim. Even so, there may be good reasons why a party remains silent. A failure by a party to respond is equivocal, especially when there are unresolved issues

A or there has been earlier prevarication: see *Amec Civil Engineering Limited v. The Secretary of State for Transport* [2004] EWHC 2339, affirmed in *Amec Civil Engineering Ltd v. Secretary of State for Transport* [2005] 1 WLR 2339; and *Collins (Contractors) Ltd v. Baltic Quay Management* (1994) Ltd [2005] BLR 63 (Court of Appeal, UK). Further, in some cases, a party may think (rightly or wrongly) a claim so preposterous that "silent treatment" is the most appropriate response. In other cases, a party may view the need to place its stand on record unimportant or even disadvantageous. For example, a defendant who adopts a policy of "masterly inactivity" has not made an admission. Judges must also bear in mind that commercial persons usually do not accord the same importance and urgency to documenting responses as lawyers do. One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized. It is impossible to generalise on the effect of silence and each matter must be assessed contextually. In essence, we are of the view that generally speaking the court ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest of cases. It should not be astute in searching for admission of a claim.

[92] As expressed earlier, it is important to bear in mind that the statement of final account relied on by the plaintiffs contains their acknowledgement of the sum recommended by the defendant with reservations. With the position taken by the defendant on the deduction or set-off even long before the matter reached the court, it cannot be confidently said that there was no dispute in the sense explained by the Court of Appeal in *Tjiong Very Sumito*.

[93] I must add a note of caution here that the above discussion does not seek to revive the old arguments that surrounded para. 10(1)(b) where the court had to determine whether in fact there was a dispute between the parties to refer to arbitration. That ground has been deleted by Parliament. The only reason why this aspect is considered is really to deal with the situation of an admission of a claim; whether an admission necessarily meant that there was no dispute to refer to arbitration. For the reasons so well articulated by the Court of Appeal, it is not in every case that that be so. The facts of the instant case do not sound in the plaintiffs' favour.

[94] Lastly, this issue of whether the steps provided in cl. 63 have to be taken before the arbitration agreement is invoked. In my judgment, it does not matter that the terms of cl. 63 requires certain steps to be taken. The operation of arbitration clauses cannot depend on whether parties actually refer the matter to arbitration; unless of course, the parties mutual agree that it does not, or where the statutory exceptions in s. 10 are present. If arbitration clauses were dependent on such a reading, as opined by Keith JA in *China Merchants Heavy Industry Co Ltd v. JGC Corp* [2001] 3 HKC 580, "It is ... stretching the language of art. 8(1) unduly to call an agreement conferring on a party the right to refer a dispute to arbitration "inoperative" merely because that party chooses not to exercise that right."

[95] Even if no reference has been made under cl. 63, that still does not make the arbitration agreement inoperative or incapable of being performed. In the case of *Westco Airconditioning Limited v. Sui Chong Construction & Engineering Co Limited* [1998] 1 HKC 254, it was argued that the arbitration was "subject to a condition precedent, that is, before the matter may proceed to arbitration, the architect must decide the matter, or the time for him to make a decision must elapsed, neither of which has happened. This means, says Mr Lam, that the arbitration agreement was "inoperative".

[96] Findlay J found that Mr Lam had found support for his proposition in the case of *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1992] 1 QB 656 at p. 669. In that case, the arbitration agreement required a dispute to be referred, in the first place, to a panel of three persons (acting as experts but not as arbitrators) before proceeding to arbitration. At the Court of Appeal, Staughton LJ said:

> Many types of contract provide for some preliminary step to be taken before there is an arbitration. I cannot see that this entitles a party to disregard the arbitration procedure altogether and start an action at law, merely because the preliminary step has not been taken. In many cases, the arbitration could be altogether bypassed if that were permitted.

[97] However, at the House of Lords, reported in *Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others* [1993] AC 334, Lord Mustill had some difficulty in finding that the clause in the contract with which he was concerned was 'an arbitration agreement'. Findlay J observed that Lord Mustill said

at p. 353 that "there was "substantial force' in the argument that it was not, but was an agreement to submit the dispute to a panel of experts, "the arbitrators providing no more than a contingent form of appeal". Insofar as the case before His Lordship was concerned, Findlay J said:

> I must say that I do not find myself such difficulty with the clause before me. The parties agreed to submit their disputes to the architect in the first instance. That reference may not be to arbitration because the architect may not give a decision at all, and, if he does, it may not be binding. But, whatever the outcome of the reference to the architect, the parties have the right to refer the dispute to what is undoubtedly an arbitration. An agreement that requires that the parties submit their disputes ultimately to arbitration, although it may also require the parties in the first instance to follow a procedure – such as, attempting an amicable settlement – is, to my eyes, an arbitration agreement. A first instance procedure such as this is not in any way inconsistent with the concept of arbitration, or with our statutory definition of 'arbitration agreement'.
>
> There is, therefore, as I see it, a clear 'agreement by the parties to submit to arbitration' their disputes. It matters not, it seems to me, that the parties must, firstly, take some other step before this is done. It cannot possibly have been the intention of the parties that, if one of them issues a writ before that step is taken, their joint wish to avoid proceedings at law is frustrated. And it would make a complete nonsense of the arbitration agreement if it were so that one party could issue a writ on the eighty-ninth day, and the court was not bound to grant a stay then, but it must grant it on the ninety-first day because the period has then expired. I have no doubt that I have before me an arbitration agreement, and that being the case, I am required by the statute to refer the parties to arbitration.
>
> In my view, what the statute means when it says 'refer the parties to arbitration' is not 'refer the dispute to the arbitrators', as Lord Mustill suggests in relation to the Convention, but refer the parties to the process of arbitration that the parties have agreed to undertake, and if this involves a preliminary step that the parties have agreed, to complete that step. Accordingly, I find that the arbitration agreement is not 'null and void, inoperative or incapable of being performed', and I am bound, in terms of the statute, to refer the parties to the arbitration to which they agreed.

[98] Similarly, I find that sub-s. 10(1) and terms of this arbitration agreement required the parties to refer their disputes to arbitration; and not to arbitrators.

[99] In any case, having regard to the whole agreement in which this arbitration agreement is housed, it is quite apparent that the parties intended the resolution of any of their dispute or difference through a process other than recourse to the court. If the plaintiffs' arguments were to be accepted, it can be seen that it may be open to abuse. Parties may avoid their contractual obligations by simply not complying with its terms. It is in this regard that a more robust approach needs to be taken.

[100] I must add that I do not find on the present facts, any evidence of the defendant having taken a step in these proceedings such as to disentitle them to the order of stay. The matters referred to by the plaintiffs which occurred before the learned Deputy Registrar during case management cannot be considered as within the meaning of "steps" in s. 10. Those steps must be definitive, conscious and deliberate steps taken in respect of participating in these court proceedings. Attending these early case managements before the learned Deputy Registrar cannot be regarded as within that meaning; certainly having appreciated what transpired in those case management sessions.

[101] The defendant's application (prayers (i) and (iii)) is therefore allowed with costs of RM10,000.